Section 274(c)(2)(B) only delineates three conditions that the BOC must meet to "team": (1) the BOC can only provide "facilities, services and basic telephone service information," (2) the BOC cannot "own" the teaming or business arrangement and (3) the BOC must be willing to enter into teaming arrangements with electronic publishers on a nondiscriminatory basis. If these conditions are met and the other provisions of Section 274 are satisfied, the BOC should be free to enter into "teaming or business arrangements" with a "separate affiliate" or "electronic publisher" to jointly market electronic publishing services. Clearly, Congress intended broad possibilities in these "teaming or business arrangements" by choosing not to adopt limits or restrictions other than these conditions. Accordingly, Ameritech urges the Commission not to frustrate Congressional intent by adopting any limits on the type of permissible marketing activities that the BOC may engage under "teaming or other business arrangements."

"Teaming" was a concept that was previously used under the Modification of Final Judgment ("MFJ").[55] But Congress has greatly expanded "teaming" employed under the MFJ in its enactment of Section 274. First, as noted above, there are only three conditions the BOC must satisfy in order to "team." Second, the BOC can engage in "joint marketing" with the electronic publisher through "inbound telemarketing," "teaming" or an "electronic publishing joint venture." Third, the

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[55] Under the MFJ, it was widely recognized that the MFJ's restrictions did not prohibit a BOC from entering into a "teaming arrangement" with a third party not subject to the same MFJ restrictions in order to provide a complete telecommunications solution for a customer. See, Letter for C. Robinson, Dept. of Justice, to K. Hardmann, Mobile Telecommunications Technologies Corp. at 2-3 (Dec. 12, 1991). Since they did not violate the interLATA prohibition of the MFJ, teaming arrangements do not violate the interLATA prohibition of the Act. In fact, section 274(c)(2)(B) specifically references "teaming arrangements."

BOC can share revenue with electronic publisher. Under Section 274(c)(2)(C), the BOC may share in up to ten percent of the revenue of a "teaming or business arrangement" that is not an "electronic publishing venture."[56] Fourth, the BOC can "own" up to ten percent of a teaming arrangement[57] or up to fifty percent of an "electronic publishing joint venture." In adopting these permissible activities, Congress has chosen to broaden and enhance the type of teaming previously allowed under the MFJ.

5. Non-discrimination Safeguards

Section 274(c)(2)(B) allows the BOC to team "to engage in electronic publishing" with any separated affiliated or any other electronic publisher so long as:[58] (1) the BOC is willing to enter into teaming arrangements with any other electronic publisher on a nondiscriminatory basis; (2) the BOC only provides facilities services [as defined in Section 274(i)(2) and basic telephone service information [as defined in Section 274(i)(3)]; and (3) the BOC does not own more than 10 percent of such teaming arrangement.

As with inbound telemarketing and referral services, the key to allowing the BOC to engage in joint marketing activities with an electronic publishing affiliate is the nondiscrimination requirement of this Section. So long as the BOC must

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[56] Section 274(i)(8) defines the term "own" -- as used in Section 274(c)(2)(C) -- to mean equity ownership greater than ten percent or the right to receive revenue greater than ten percent.

[57] 47 U.S.C. §274(i)(8).

[58] Other than the requirements discussed in this paragraph, there are no restrictions on the form or manner in which teaming arrangements are carried out. Such combined promotions can be made to customers in person, in a written proposal or in advertisements or promotions so long as the delineated conditions are met.

engage in the same type of teaming arrangements with nonaffiliated electronic publishers, the electronic publishing affiliate of the BOC gains no competitive advantage. The nondiscrimination requirement insures a level playing field for all electronic publishers while allowing the BOC flexibility to work with such electronic publishers. In view of this level playing field envisioned by Section 274(c)(2)(B), the Commission should seek to foster the development of broad teaming arrangements that will permit the BOCs to compete on the same basis as other electronic publishers.

IV. Alarm Monitoring Services

The Commission, in paragraph 70, correctly states that: "Ameritech provides an alarm monitoring service directly to end-user customers, including the sale, installation, monitoring and maintenance of monitoring and control systems for end-users." This end-to-end service clearly falls within the definition of alarm monitoring in Section 275(e) in that the service provided to residence or business customer uses a device at the customer's premise (the alarm panel) that both receives signals from other devices (e.g., sensors on doors and windows) and calls the remote monitoring center with an alarm signal.

In paragraph 69, the Commission tentatively concludes that, for a service to be an "alarm monitoring service," it has to be an "information service." Ameritech agrees with this conclusion. Section 272(2)(C) refers to "InterLATA information services other than... alarm monitoring services (as defined in Section 275(e))."

In paragraphs 69 and 70, the Commission asks whether the "ScanAlert" service falls within the definition of alarm monitoring services set forth in Section 275(e). ScanAlert and similar tariffed transport services are provided to the alarm companies by the LECs. Because they are not "information services," they cannot fall within the definition of alarm monitoring services. They have been found to be "basic services" by the Commission[59] and, as discussed below, a basic service cannot be an "information service."

In 1988, the Commission ruled that Southwestern Bell Telephone Company's "Loop Status Verification Service," a service which is identical in all material aspects to ScanAlert service, was a "basic service." The Commission stated:

> "SWBT's proposed service is a basic service and should therefore be offered under tariff. The proposed service involves a scanning and routing function as well as the transmission of information. The transmitted information will not be altered or restructured, and there is no subscriber interaction with stored information. (emphasis added.)[60]

The Commission found that "this is basic service of great potential use to alarm companies"[61] -- something far different from finding that SWBT became an alarm company by offering this service.

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[59] In the Matter of SOUTHWESTERN BELL TELEPHONE COMPANY; Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Loop Status Verification Service; SOUTH CENTRAL BELL TELEPHONE COMPANY AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY; Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Spread Spectrum Transmission Services, AAD 8-1918; AAD 8-1925, Adopted July 22, 1988; Released; August 5, 1988.

[60] Id. at ¶18.

[61] Id.

In paragraph 70, the Commission also seeks comments on whether the "Versanet" service provided by US West and others is an "alarm monitoring service" as defined in Section 275(e) of the Act. Like ScanAlert, Versanet is not an "information service" and, therefore, cannot be an alarm monitoring service.

US West refers to Versanet as another "transport" product it offers to alarm companies.[62] Though both Versanet and ScanAlert are transport services, Versanet is classified as an enhanced service and ScanAlert is classified as a basic service.[63] However, the fact that Versanet is classified as enhanced does not make it an information service. As stated by US West, Versanet is an enhanced service only because it involves protocol conversion.[64]

As the Commission noted in the In-Region NPRM, enhanced services are essentially the same as information services.[65] However, one difference is relevant here. Since protocol conversion makes a service an enhanced service, but does not necessarily make it an information service.[66] Therefore, the term "enhanced service" is slightly broader than the term "information service." No basic service is an information service, but not all enhanced services are information services.

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[62] Letter from Eldridge A. Stafford, Executive Director - Federal Regulatory, US West to Rose Crellin, FCC, dated May 9, 1996, cited in NPRM ¶70 n.107.

[63] Id.

[64] Id.; See also In the Matter of SOUTHWESTERN BELL TELEPHONE CO., supra, at ¶12, (description of Versanet as involving code conversion from FSK to ANCII.)

[65] In-Region NPRM (¶42) n.85.

[66] See, Response of the United States to Comments on its Report and Recommendations Concerning the Line-of-Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment at 83, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 27, 1987) (noting that there are "types of protocol conversion services that are not deemed information services"). See also Comments of Bell Atlantic, CC Docket No. 96-149, August 15, 1996, at A2-A3.

That is why US West was able to offer Versanet, without obtaining a waiver, before the MFJ's information services restriction was removed.

Finally, even if a service did not have to qualify as an information service in order to be an "alarm monitoring service," Versanet would not fall within the definition of alarm monitoring service contained in Section 275(e). As US West stated, Versanet is a "transport product." If transporting the alarm signal to the monitoring center was sufficient to make the telephone company providing the transport into a provider of alarm monitoring service, all telephone companies would be alarm monitoring service providers. Obviously, the "service" must include more than transport.

In paragraph 71, the Commission seeks comments on what types of activities constitute the "provision" of alarm monitoring activities. Ameritech agrees with the Commission's view that resale of an alarm monitoring service constitutes provision of that service. The status of billing and collection arrangements is equally clear. The LEC providing billing and collection service to an alarm monitoring company is no more the provider of the service billed for than is Visa the provider of food service when it bills for a restaurant. Similarly, sales agents, such as Centrex sales agents, have never been considered to be providers of the service being sold and there is no reason for a different interpretation in the case of alarm monitoring service. In the case of a sales agent, the principal, not the agent, is providing the service.

Nor does marketing the service of an alarm service company make the company doing the marketing the "provider" of the alarm service. Marketing is a function often performed by entities acting as agents for the provider of the service. For example, an advertising agency does marketing for advertisers. No one would claim that this activity makes the agency into the provider of the advertiser's product or service. Similarly, it would be absurd to hold that a sales agent could not market the principal's product or service without being found to be the provider of the product or service. Marketing is an inherent part of a sales agent's functions. A sales agent is by definition part of the principal's distribution channels, which is part of its marketing operations.

The Commission inquires about the effect of "financial arrangements" on what constitutes provision of alarm services. It is Ameritech's position that the arrangements must be looked at on a case-by-case basis to see if the compensation is consistent with the value of the services rendered-e.g., billing and collection, acting as a sales agent, etc.

In paragraph 72, the Commission requests comments on the meaning of "equity interest" and "financial control" as those terms are used in Section 275(a)(2). It also requests comments on "the conditions under which an 'exchange of customers' would be consistent with the Act's purposes." Although these questions are likely to be resolved in the on-going proceeding involving Ameritech's acquisition of the alarm monitoring assets of Circuit City, Ameritech offers these comments in direct response to the Commission's questions.

The term "equity interest" has a well established meaning in the law, namely a stock or partnership interest in an entity that confers voting rights and participation in the entity's profits and losses.[67] Because Congress did not define "equity interest" for purposes of Section 275(a)(2), it should be presumed that Congress intended that term to retain its established meaning.[68]

The term "financial control" is self-defining: it means to control financially - *i.e.*, to have the power to make an entity's financial decisions.[69]

The answer to the Commission's question about the "exchange of customers" provision is simple. This provision allows exchanges in all circumstances, including situations where, for business purposes, the exchange of customers is carried out by the exchange of 100% equity interests in alarm monitoring entities whose only assets are the accounts being swapped. That is what the language says

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[67] See, e.g., 26 U.S.C. § 2701(a)(4)(B)(ii) (defining "equity interest" for purposes of tax code's special valuation rules as "stock or any interest as a partner as the case may be"); 12 C.F.R. § 7.2005 (adopted Feb. 8, 1996) (equating "equity interest" with stock ownership); United States v. Western Elec. Co., 1986-2 Trade Cas. (CCH) ¶67,213, at 61,052 n.3 (D.D.C. Aug. 7, 1986) (noting Department of Justice's view that "the principal attributes of an equity interest" are "participation in the operating or capital profits and losses of the investment, voting rights, and the right to transfer the interest"), rev'd on other grounds, 894 F.2d 430 (D.C. Cir. 1990).

[68] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 47-48 (1989); Kungys v. United States, 485 U.S. 759, 770 (1988); NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981). Indeed, Congress's use of the term "equity interest" in other Sections of the Telecommunications Act confirms that it understood this term in the traditional way. See, e.g., 47 U.S.C. § 273(d)(8)(A) (referring to "equity interest" in terms of percentage of voting equity); id. §274(i)(8) ("own[ing]" an entity means having an equity interest of more than 10% of that entity). The Commission has used the term in the same way. See 47 C.F.R. § 76.1401(b) (adopted Apr. 26, 1986); id. §76.1403(c).

[69] See, e.g., In re Applications of Kist Corp. et al., 99 F.C.C.2d 201, 251, 253 (I.D. 1983) (equating financial control with having the power to dictate the use of the entity's funds), aff'd in relevant part, 99 F.C.C.2d 173 (Rev. Bd. 1984), aff'd in relevant part, 102 F.C.C.2d 288 (1985): In re Applications of Henderson Broadcasting Co. et al., 63 F.C.C.2d 419, 422 (Rev. Bd. 1977) (equating financial control with "complete control of the purse strings," "veto power" over financial decisions, and the power to appoint, discharge, and fix compensation of the entity's employees and agents).

and that is plainly what Congress meant. Because that is what Congress stated in plain language,[70] customer exchanges are consistent with Congressional purpose.

The Commission correctly notes that Section 272 twice exempts the provision of alarm monitoring services from the separate affiliate and nondiscrimination requirements of that Section.[71] Both Sections 272(a)(2)(C) and 272(a)(2)(B)(i) are explicit on this point.[72] And unlike Section 274's treatment of electronic publishing, Section 275 does not construct a new separation requirement apart from Section 272, instead expressly authorizing the provision of alarm monitoring services directly by the BOC or through an affiliate.[73]

The Commission also notes that in contrast to Section 272 which applies only to BOC provision of interLATA information services, Section 275 does not distinguish between the intraLATA and interLATA provision of alarm monitoring services.[74] Comment is sought on whether Section 275 applies to BOC provision of both intraLATA and interLATA alarm monitoring.[75]

Section 275 clearly applies to BOC provision of all "alarm monitoring services," as defined in that Section, regardless of whether the service is interLATA

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[70] Of course this does not preclude application of other relevant laws, such as antitrust laws.

[71] NPRM (¶73).

[72] 47 U.S.C. §§272(a)(2)(C) and 272(a)(2)(B)(i).

[73] 47 U.S.C. §§274 and 275. For example, Section 275(a)(2) which grandfathers existing activities "does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a Bell Operating Company."

[74] 47 U.S.C. §275.

[75] NPRM (¶73).

or intraLATA. Section 275(e) defines the term "alarm monitoring service" without regard to LATA or other geographic boundaries.[76] Similarly, Section 275's general prohibition on BOC entry,[77] grandfathering provision,[78] and nondiscrimination duties[79] apply to all BOC alarm monitoring services, interLATA or intraLATA. In fact, the term "LATA" cannot be found within Section 275.

Reference to the legislative history of Section 275 is unnecessary and unwarranted due to the unambiguous language of the statute. Nevertheless, nothing within the Joint Explanatory Statement of the Conference Committee suggests that the provisions of Section 275 should not be applied equally to interLATA and intraLATA alarm monitoring services. Had Congress wished to differentiate between interLATA and intraLATA alarm monitoring, it could easily have done so. Moreover, the imposition of prohibitions and duties upon both interLATA and intraLATA services is not unique to alarm monitoring services. For example, Congress chose to apply the separation and nondiscrimination requirements of Section 274 to all BOC provision of electronic publishing, inter and intraLATA.

The Commission asks for comment on whether the existing Computer Inquiry III ("CI-III") nondiscrimination and network unbundling requirements, as applied to BOC provision of alarm monitoring services, are consistent with the

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[76] 47 U.S.C. §275(e).

[77] 47 U.S.C. §275(a)(1).

[78] 47 U.S.C. §275(a)(2).

[79] 47 U.S.C. §275(b).

parallel requirements of Section 275.[80] The CI-III regime currently in effect includes a parameter requiring that BOCs providing enhanced services (including alarm monitoring services) obtain underlying basic services at the same tariffed rates, and on the same terms and conditions, available to nonaffiliated providers.[81] Thus, there is no inconsistency between the two requirements. However, as noted in Ameritech's Comments in the pending CI-III remand proceeding, the CI-III requirements have long since outlived their usefulness given the robust state of competition in the enhanced services industry.[82] If the Commission does elect to remove the outmoded CI-III construct, the protections afforded by Section 274(b)[83] will suffice to insure the rapid development of robust competition in the alarm monitoring services marketplace by ensuring that new entrants have full and nondiscriminatory access to the basic services necessary for entry. In fact, the expedited complaint routines set out in Section 274(c)[84] go beyond the measures embodied in the current CI-III construct, foreclosing any claim of their insufficiency.

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[80] NPRM (¶74).

[81] In the Matter of Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36, Memorandum Opinion and Order, rel. January 11, 1995, at 13 (¶ 21); see also Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Order, 104 FCC 2d 958, 1036 (¶147) (1986).

[82] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rule Making, 10 FCC Rcd 8360 (1995), Comments of Ameritech, filed July XX, 1995.

[83] 47 U.S.C. §274(b).

[84] 47 U.S.C. §274(c).

V. Enforcement

In Paragraphs 79 and 82, the Commission seeks comment concerning a number of issues concerning enforcement. With respect to both Sections 274 and 275, the Commission inquires about the standard for a prima facie case,[85] and proposes shifting the burden of proof to the defendant once a complainant makes out a prima facie case. The Commission also asks for comments concerning the showing required for a cease and desist order under Section 274(e)(1), and its relation to an order under Section 275(c) or 260(b).[86]

A complaint alleging a violation of Section 274, 260, or 275 should be treated no differently from a complaint alleging a violation of any other Section of the Communications Act.[87] As the NPRM makes clear, a complainant always has the burden of proving that there has in fact been a violation of the Communications Act.[88] At times, when the term "prima facie case" is used to require a finding based on an unrebutted mandatory presumption, courts have permitted a burden-shifting procedure to give effect to the evidentiary presumption.[89] Even in those situations, however, the U.S. Supreme Court has emphasized that the defendant's burden is a

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[85] NPRM (¶¶79, 82).

[86] Id. at ¶¶80, 84.

[87] NPRM (¶79)nn.133-135.

[88] NPRM (¶79)nn.133-135. This principle follows necessarily from the very definition of a prima facie case: "The phrase 'prima facie case' * * * may denote [1] the establishment of a legally mandatory, rebuttable presumption, [or] * * * [2] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981). At a minimum, therefore (when the term is used in the second sense), a complaint must permit a finding of violation, at least in the absence of evidence to the contrary.

limited one: the defendant must shoulder a burden of production (not the ultimate burden of persuasion).[90] And even that limited burden has a narrow application: it goes only to the particular presumption at issue.[91]

The Administrative Procedure Act confirms that any burden-shifting at the administrative level must be similarly narrow. "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[92] The U.S. Supreme Court confirmed just two years ago that the APA's mandate refers to the burden of persuasion.[93] There is nothing in the 1996 Act that indicates a Congressional intent to alter the APA's statutory mandate concerning the burden of proof. Thus, the Commission is statutorily prohibited from shifting the ultimate burden of persuasion to the defendant.

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[89] See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-256 (1981).

[90] Id. at 255-256.

[91] Id. at 255.

[92] 5 U.S.C. §556(d).

[93] Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251, 2257 (1994).

Even as to a particular component of an alleged violation, the complainant must bear the burden of proof. While the Supreme Court has authorized shifting the burden to a defendant who seeks to demonstrate an affirmative defense, there is no basis for doing so as to an element of the offense. Indeed, it may very well violate the Due Process clause to impose on a defendant the obligation to disprove what amounts to a presumption of guilt.[94]

As the Commission recognizes (¶¶ 79, 82), its burden-shifting proposal is imported from the BOC In-Region NPRM (Docket 96-149). Because similar fundamental policy concerns pertain in this context, Ameritech hereby incorporates by reference its comments in response to that inquiry.[95] As in that proceeding, Ameritech believes that the variety of potential complaints defies any useful attempt to describe with specificity the elements of a prima facie case.[96] Moreover, Ameritech submits that the flexibility of the Commission's procedures renders unnecessary any sweeping changes merely to accommodate the shorter statutory time periods for resolving complaints under certain Sections of the 1996 Act.[97]

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[94] See generally, e.g., Martin v. Ohio, 480 U.S. 228 (1987) (discussing constitutional prohibition against imposing burden on criminal defendant to disprove element of crime; holding that imposing burden of proving affirmative defense does not run afoul of Constitution).

[95] See Ameritech Comments at 72-79.

[96] See id. at 73.

[97] Id. at 74 (noting that a complainant will have two procedural options: filing a complaint under the expedited schedule where the facts are known or proceeding under Section 208 and taking advantage of the Commission's discovery procedures).

VI. Conclusion

For the foregoing reasons, Ameritech respectfully requests that the Commission revisit its tentative structure of imposing still more regulations upon the emerging telemessaging, electronic publishing and alarm monitoring industries.

The mechanisms of a truly competitive marketplace are always far more dependable than any artificial regulatory construct. The Commission should implement the 1996 Act in the de-regulatory manner than Congress clearly envisioned and enacted.

Respectfully submitted,

Frank Michael Panek
Richard Hetke
Daniel Iannotti
Stephen Schulson

Counsel for Ameritech
Room 4H84
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
(847) 248-6064

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